



## INTERIOR BOARD OF INDIAN APPEALS

S & H Concrete Construction, Inc. v. Acting Phoenix Area Director,  
Bureau of Indian Affairs

20 IBIA 176 (08/13/1991)

Related Board case:  
19 IBIA 69



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

S & H CONCRETE CONSTRUCTION, INC.

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-35-A

Decided August 13, 1991

Appeal from a denial of a loan application under the Indian Revolving Loan Program.

Affirmed.

1. Administrative Procedure: Burden of Proof--Indians: Financial Matters: Financial Assistance

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

2. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

Decisions concerning whether an application for a loan under the Indian Revolving Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Arlette M. Hall, appellant's president, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant S & H Concrete Construction, Inc., seeks review of a December 13, 1990, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), denying its application for a direct loan under the Indian Revolving Loan Program. For the reasons discussed below, the Board affirms the Area Director's decision.

### Background

The Area Director initially denied appellant's loan application on March 30, 1990. Appellant appealed the denial and, on November 15, 1990, the Board remanded the matter to the Area Director after concluding that neither the Area Director's decision nor the administrative record was sufficient to show how BIA reached its conclusions concerning appellant's financial condition. S & H Concrete Construction, Inc. v. Acting Phoenix Area Director, 19 IBIA 69 (1990). On December 7, 1990, appellant's president, Arlette M. Hall, met with Area Office staff and submitted an amended application, which apparently was virtually identical to the original application. On December 13, 1990, the Area Director again denied appellant's application. Appellant again appealed. Appellant's notice of appeal was received by the Board on January 10, 1991. No briefs were filed.

### Discussion and Conclusions

[1] Appellant did not state in its notice of appeal why it believed the Area Director's decision was in error. It did not file a brief. Normally in such a case, an appellant is deemed to have failed to carry his/ her burden of proof, and the decision appealed from is summarily affirmed, in accordance with the Board's rule that, in appeals arising under 25 CFR Part 2, an appellant bears the burden of showing error in the BIA decision appealed from. E.g., Hernandez v. Acting Aberdeen Area Director, 19 IBIA 162 (1991); Bell v. Aberdeen Area Director, 19 IBIA 150 (1991).

Appellant may have believed that it was not required to give reasons for its second appeal because the matter was previously before the Board. It is also possible that appellant intended, although it did not so state, that a January 4, 1991, letter to Representative John J. Rhodes would serve as its brief or statement before the Board. A copy of this letter was attached to appellant's notice of appeal. The letter, however, discusses events prior to the Board's remand of this matter on November 15, 1990. It makes no allegations of error in the Area Director's December 13, 1990, decision.

The letter does make a general allegation that Area Office staff members were biased against appellant's president because she is a member of the Cheyenne River Sioux Tribe, whose reservation is in South Dakota, and because her husband is a non-Indian. The letter includes absolutely no support for this allegation. A bare allegation of bias is insufficient to establish that BIA employees were in fact biased.

The Area Director's December 13, 1990, decision, unlike his earlier decision, contains an analysis of appellant's financial condition, including a discussion of the factors which led the Area Director to conclude that there was not a reasonable prospect that appellant could repay the loan. <sup>1/</sup>

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<sup>1/</sup> The decision indicates that the Area Director relied in part on a "20 percent equity" requirement contained in unpublished "Guidelines for

[2] 25 U.S.C. § 1463 (1988) provides: "Loans [from the Indian Revolving Loan Fund] may be made only when, in the judgment of the Secretary, there is a reasonable prospect of repayment." See also 25 CFR 101.3. Under this provision, BIA officials are vested with discretion to assess a loan applicant's prospect of repaying the loan and to approve or disapprove an application based upon such an assessment. In reviewing the BIA decision, the Board does not substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. E.g., McDonald v. Portland Area Director, 18 IBIA 399 (1990); Gauthier v. Portland Area Director, 18 IBIA 303 (1990).

Appellant does not contend that the Area Director's conclusions concerning its financial condition are in error. Under the circumstances present here, the Board will not disturb the Area Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Phoenix Area Director's December 13, 1990, decision is affirmed.

//original signed

Anita Vogt,  
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn  
Chief Administrative Judge

fn. 1 (continued)

Fiscal Year 1990 Financial Assistance Programs" issued by the Assistant Secretary - Indian Affairs on Dec. 6, 1989. As the Board noted in its earlier decision, 19 IBIA at 71 n.5, this requirement is not contained in the regulations governing the Indian Revolving Loan Program.

The Board finds that, in this case, the Area Director's reliance on the unpublished requirement was not critical to his decision; the remainder of his analysis, was adequate to support the decision.